Supreme Court, U.S.
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No._____

IN THE
Supreme Court of the United States

October Term 1995

MARK MCWILLIAMS,

Petitioner,

v.

FAIRFAX COUNTY BOARD
OF SUPERVISORS,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 703(a) of Title VII of the Civil Rights Act of 1964 prohibits a hostile environment claim where both the alleged harassers and the victim are the same sex.

2. Whether the sexual orientation of the harasser and/or the victim are requisite elements of proof for a Plaintiff urging hostile work environment sexual harassment under Section 703(a) of Title VII of the Civil Rights Act of 1964.

PARTIES TO THE PROCEEDING

1. Mark McWilliams (hereinafter referred to as "McWilliams"), Plaintiff in the District Court and Petitioner.

2. Fairfax County Board of Supervisors [1] (hereinafter referred to as "Fairfax County"), Defendant in the District Court and Respondent.[2]

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[1] McWilliams' supervisors, Lee Cash and Miguel Boschulte were individually named defendants in the District Court proceedings for violations of 42 U.S.C. § 1983. They are not included herein.

[2] Carl Hellmandollar, Trevor Pinnock, David Puckett, James Riddle, Charles Shelton, Douglas Witsman, and Elmer Powell were listed as individual Defendants in the District Court proceedings. By stipulation of the parties and Order of the court issued November 15, 1994, these individuals were dismissed from the Appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

CITATION OF OPINIONS 2

JURISDICTIONAL STATEMENT 2

APPLICABLE STATUTE 2

STATEMENT OF CASE 3

REASONS FOR GRANTING PETITION 8

I. Granting of the Petition is Warranted Because the Fourth Circuit Opinion Creates Standards Not Required by Title VII 9

A. Plain Language of the Statute 9

B. Civil Rights Act of 1991 14

C. EEOC Guidelines and Policy 16

II. Granting of the Petition is Warranted Because the Fourth Circuit's Opinion is Contrary to Supreme Court Precedent 19

III. Granting of the Petition is Warranted Because the Case Law is Replete with Conflicting Interpretations of the Law 24

CONCLUSION 29

APPENDIX ..... Ai

TABLE OF AUTHORITIES

CASES: PAGE

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 17

Ashworth v. Roundup Co.,
68 FEP Cases 869 (W.D. Wash. 1995) 26

Baskerville v. Culligan International Co.,
50 F.3d 428 (7th Cir. 1995) 26

Benekritis v. Johnson,
882 F. Supp. 521 (D.S.C. 1995) 27

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 10

Boyd v. Vonnahmen et al,
67 FEP Cases 1769 (1995) 25

Bundy v. Jackson,
641 F.2d 934 (D.C. Cir. 1981) 10

Connecticut v. Teal,
457 U.S. 440 (1982) 14

Diaz v. Pan American World Airways,
442 F.2d 385 (5th Cir. 1971) 14

Dothard v. Rawlinson,
433 U.S. 321 (1977) 14

EEOC v. Arabian Am. Oil Co.,
111 S.Ct. 1227 (1991) 15

EEOC v. Hacienda Hotel,
881 F.2d 1504 (9th Cir. 1989) 26

EEOC v. Walden Book Co.,
885 F. Supp. 1100 (M.D. Tenn. 1995) 25

Ecklund v. Fusiz Technoloigy, Ltd,
905 F. Supp. 335 (E.D.Va 1995) 25

Fleenor v. Hewitt Soap Co.,
67 FEP Cases 1625 (S.D. Ohio 1995) 28

Garcia v. Elf Atochem North America,
28 F.3d 446 (5th Cir. 1994) 27, 28

General Electric v. Gilbert,
429 U.S. 125 (1976) 10, 15

Goluszek v. Smith,
697 F. Supp. 1452 (N.D. Ill. 1988) 27, 28

Griffith v. Keystone Steel and Wire,
887 F.Supp. 1133 (C.D.Ill. 1995) 25

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 10, 13, 17

Harris v. Forklift Systems, Inc.,
114 S. Ct. 367 (1993) ..... passim

Henson v. City of Dundee,
682 F.2d 897 (1982) 10, 20

Hopkins v. Baltimore Gas & Elec. Co.,
77 F.3d 745 (4th Cir. 1996) 28

International Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 13

Joyner v. AAA Cooper Transp.,
597 F. Supp. 537 (M.D. Ala. 1983)
aff'd without opinion 49 F.2d 732 (11th Cir. 1984) 26

Kelly v. Robinson,
107 S. Ct. 353 (1986) 10

King v. M. R. Brown, Inc.,
911 F. Supp. 161 (E.D. Pa. 1995) 25

Landreth Timber Co. V. Landreth,
471 U.S. 681 (1985) 9

La Riviere v. EEOC,
682 F.2d 1275 (9th Cir. 1982) 11

Los Angeles Dept. of Water and Power v. Manhart,
435 U.S. 702 (1977) 11, 13, 22

Marrero-Rivera v. Department of Justice,
800 F. Supp. 1024 (D. P.R. 1992) 27

Mayo v. Kiwest Corp.,
898 F. Supp 335 (E.D. Va. 1995) 27

McCoy v. Johnson Controls Inc.,
878 F. Supp. 229 (S.D. Ga. 1995) 25

McDonald v. Santa Fe Trail Transportation Co.,
427 U.S. 273 (1976) 11

McWilliams v. Fairfax County Board of Supervisors,
72 F.3d 1191 (4th Cir. 1996) ..... passim

Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986) ..... passim

Meyers v. City of El Paso,
874 F. Supp. 1546 (W.D. Tx. 1995) 27

Morgan v. Massachusetts General Hospital,
901 F.2d 186 (1st Cir. 1990) 26

Nashville Gas Company v. Satty,
434 U.S. 136 (1977). 15

Nogueras v. Univ. of Puerto Rico,
890 F. Supp. 60 (4th Cir. 1992) 25

Oncale v. Sundowner,
1996 U.S. App. LEXIS 11479 (5th Cir. 1996) 28

Parrish v. Washington National Insurance Co.,
1990 U.S. Dist. LEXIS 13934 (N.D. Ill. Oct. 19, 1990) .. 27

Parrot v. Cheney,
748 F. Supp. 312 (D. Md. 1989) 11

Polly v. Houston Lighting & Power Co.,
825 F.Supp. 135 (S.D. Tex. 1993) 27

Prescott v. Independent Life & Accident,
878 F. Supp. 1545 (M.D. Al. 1995) 25

Pritchett v. Sizeler Real Estate Mgmt. Co.,
67 FEP Cases 1377 (E.D. La. 1995) 25

Quick v. Donaldson Co., Inc.,
895 F. Supp. 1288 (S.D. Iowa 1995) 27

Rake v. Wade,
113 S. Ct. 2187 (1993) 9

Raney v. District of Columbia,
892 F. Supp. 283 (D.D.C. 1995) 25

Roe v. K-Mart Corp.,
1995 U.S. Dist. LEXIS 18211 (D.S.C. March 28, 1995) .. 25

Rogers v. EEOC,
454 F.2d 234 (5th Cir. 1971),
cert denied, 406 U.S. 957 (1972) 10, 13

Ryczek v. Guest Services, Inc.,
877 F. Supp. 754 (D.D.C. 1995) 27

Sardinia v. Dellwood Foods, Inc.,
1995 U.S. Dist. LEXIS 16073 (S.D. NY Nov. 1, 1995) .. 25

Saulpaugh v. Monroe Community Hosp.,
4 F.3d 134 (2d Cir. 1993)
cert. denied 114 S. Ct. 1189 (1994) 26

Spicer v. Commonwealth of Virginia,
66 F.3d 705 (4th Cir. 1995) 6

Tomkins v. Public Service Elec. & Gas,
568 F.2d 1044 (3d Cir. 1977) 11

Vandeventer v. Wabash Nat'l Corp.,
867 F. Supp. 790 (N.D. Ill. 1994) 27

Williams v. District of Columbia,
1996 U.S. Dist. LEXIS 1338 (D.D.C. Feb. 5, 1996) 25

Wright v. Methodist Youth Services, Inc.,
511 F. Supp. 307 (N.D. Ill. 1981) 25

Wrightson v. Pizza Hut of America Inc.,
909 F. Supp. 367 (W.D. N.C. 1995) 27

STATUTES AND REGULATIONS:

28 U.S.C.§ 1254 (1) 2

42 U.S.C. § 2000e ..... passim

42 U.S.C. § 2000e-4 16

42 U.S.C. § 2000e (k) 16

29 C.F.R. § 1604.11 (a)(3)(b) 17

TREATISES, JOURNALS AND MANUALS:

EEOC Compliance Manual 10, 18, 23

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petition for Writ of Certiorari

Mark McWilliams respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

CITATION OF OPINIONS

The opinion of the court of appeals (App., infra, A1-15) is reported at 72 F.3d 1191 (4th Cir. 1996).

The Order of the court of appeals (App., infra, A16-17) denying McWilliams Petition for Rehearing with Suggestion for Rehearing in Banc, is unreported.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari under 28 USC §1254 (1).

APPLICABLE STATUTE

This case involves Section 703 (a)(1) of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-2 (a) which provides in relevant part:

> It shall be an unlawful employment practice for an employer --
>
> . . . to discriminate against any individual with respect to his compensation, terms, conditions,

or privileges of employment because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF CASE

This is a case about the sexual harassment McWilliams endured during the course of his employment at the Newington Facility of the Fairfax County Equipment Management Transportation Agency (EMTA).[1] McWilliams is a thirty-six year old learning disabled man with the appearance and intellect of an adolescent. As a result of his learning disability, McWilliams' cognitive abilities are far below those of the average adult. His learning disability extends into a pervasive developmental disability which means that his level of cognitive and emotional development is like that of a child.

McWilliams' co-workers, commonly and collectively

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[1] At all times relevant to this case, EMTA was a subdivision of Fairfax County.

known as the "lube boys, " took full advantage of McWilliams' diminished intellect. In or around 1989, the "lube boys" began to call McWilliams names, tease him, make sexual remarks to him. They would ask him about his sexual activities, accuse him of bestiality, and ask him to perform sexual acts on them. The "lube boys'" harassment of McWilliams went far beyond mere verbal abuse, lewd comments and exhibitionism. The "lube boys" also sexually touched McWilliams, blindfolded him, and tied him up. Witsman put his arm around McWilliams while he was entering the bathroom; then Witsman put his hand down his own pants and protruded his finger through the zipper while saying something to the effect of "Come on, lets go to the stall together." On another occasion, Witsman massaged McWilliams' genitals. And at least once, Witsman offered McWilliams money for sex.

In addition to telling his parents and brother about the harassment by the "lube boys," McWilliams told several people

within EMTA of these events. The harassment continued unabated.

Ultimately, in 1992, McWilliams, who had never had any prior history of emotional or psychological illness or affliction, began to see a psychiatrist. Later in September 1992, McWilliams suffered a total emotional shut-down and was diagnosed with post-traumatic stress disorder (PTSD), major depression, mixed personality features with dependant and avoidant features, and occupational stress with sexual abuse-harassment severe. His illness caused him to leave EMTA on medical leave in September 1992. McWilliams remains disabled and unable to be reemployed.

This case was filed in the United States District Court for the Eastern District of Virginia, on October 13, 1993. The District Court granted Fairfax County's Motion for Summary Judgment on April 22, 1994, and entered an Order dismissing

the case.[2] McWilliams filed a Notice of Appeal on May 3, 1994.

On appeal the court reviewed all of the issues raised in summary judgment "de novo" and held, in a two-one decision, that the conduct complained of in this action was not prohibited by Title VII of the Civil Rights Act. 42 U.S.C. § 2000e-2(a)(1). The majority concluded that a "hostile-environment claim does not lie where both the alleged harassers and the victim are

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[2] The District Court granted summary judgment on the issue of whether the Board had notice of the harassing conduct. The majority opinion, although mentioning the notice question, did not address the issue as it affirmed on other grounds. In his dissent, Judge Michael found the record replete with facts which challenged the Board's position that they did not have notice of the conduct. App. at A15. The minority held that McWilliams' Title VII claim against the Board was viable if knowledge about the abuse "was imputable on some factual basis." Spicer v. Commonwealth of Virginia, 66 F.3d 705, 710 (4th Cir. 1995) (in banc).

heterosexuals of the same sex."[3] App. at A6.

In his dissent, Judge Michael, argued that the majority elevated the sexual orientation of the parties to a required element of plaintiff's proof. This ultimately shifts the focus of the inquiry away from the conduct of the harassers to the "elusive" pursuit of their "true sexual orientation." App. at A13.

The court's decision, which the majority believes arises from a "common sense" reading of the statute creates both a new burden for the victim and a new defense for the harasser. Neither was intended by Title VII. Such reasoning is inconsistent with this Court's interpretation of Title VII in Meritor v. Vinson, 477 U.S. 57 (1986) and Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993).

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[3] The Court specifically reserved judgment on whether the homosexuality of any of the actors would make the claim cognizable under Title VII.

On March 12, 1996, the Fourth Circuit denied McWilliams' Petition for Rehearing and Suggestion for Rehearing in Banc. McWilliams now Petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING PETITION

This case involves an important issue of federal employment discrimination law that should be settled by the Court. Due to the recurring nature of the issue,[4] resolution of the question presented in this petition will have immediate importance far beyond the particular facts and parties involved.

The reasons cited by the Court of Appeals in dismissing McWilliams' Title VII claim was that Congress, in adopting the "critical causation language" and the Supreme Court in applying it to a hostile workplace environment, could not have intended Title VII to reach same gender harassment situations.

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[4] No fewer than 25 courts addressed the issue in 1995 alone. See pp. 24 - 28 infra.

App. at A8. This conclusion by the Court of Appeals results from a misapprehension of both Title VII and the Supreme Court decisions in Meritor and its subsequent progeny.

I. Granting of the Petition is Warranted Because the Fourth Circuit Opinion Creates Standards Not Required by Title VII

A. Plain Language of the Statute

The starting point in any statutory construction case of course is the language of the statute. Rake v. Wade, 113 S. Ct. 2187 (1993); Landreth Timber Co. v. Landreth , 471 U.S. 681 (1985). Absent compelling legislative history to the contrary, federal courts are obligated to apply statutes as they are written. Courts must look at the plain language of Title VII, which protects victims of sexual harassment who are harassed because of their sex. There is nothing in the language of Title VII to suggest that discrimination which would otherwise be actionable, would not be so simply because it was committed by a person of the same sex as the plaintiff. In fact, the language

has been consistently interpreted to be gender neutral and to create a "broad rule of workplace equality." Harris v. Forklift Systems, Inc., 114 S.C. 367 (1993); Meritor v. Vinson, 477 U.S. 57 (1986). Cf EEOC Compliance Manual § 615.2[5].

When faced with a challenge to the Act this court has traditionally looked first to the language of Title VII.[6]

Title VII's policy of equal protection, premised upon the

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[5] Interpretations of Title VII by the EEOC are entitled to deference because they are the views of the agency charged by Congress with enforcing Title VII. See Meritor, 477 U.S. at 65, General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Griggs v. Duke Power Co., 401 U.S. 424 (1971)

[6] Blue Chip Stamps v. Manor Drug Stores, 421. U.S. 723, 756, 95 S.Ct. 1917, 1935 (1975) cited in Kelly v. Robinson, 107 S. Ct. 353 (1986)(the "starting point in every case involving construction of a statute is the language itself."). When initially faced with the issue of harassment as a violation of Title VII, Federal Circuits looked first to the language of the Act in their analysis, in keeping with Title VII jurisprudence generally. Rogers v. EEOC, 454 F.2d 234, (5th Cir. 1971), cert denied, 406 U.S. 957 (1972). See also Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981); Henson v. City of Dundee 682 F.2d 897 (1982).

plain language of the Act, seeks to protect the individual employee, rather than a class of persons with a common characteristic. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). In Los Angeles Dept. of Water and Power v. Manhart, the Court stated that "the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." 435 U.S. 702, 709 (1977). On this reasoning, Title VII has been interpreted to protect whites as well as blacks, and men as well as women. La Riviere v. EEOC, 682 F.2d 1275, 1278 (9th Cir. 1982); Tomkins v. Public Service Elec. & Gas, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977). Because Title VII protects individuals within classes, it can protect individuals from other people within the same class. Parrot v. Cheney, 748 F. Supp. 312 (D. Md. 1989) (same race discrimination case in which black employee brought action against black supervisor). There is virtually no legislative history to provide courts with guidance as to what Congress

meant when it proscribed discrimination on the basis of sex because the word "sex" was added to Title VII at the last minute on the floor of the House of Representatives. Meritor, 477 U.S. 57, 63. Consequently, courts are guided by general principles of Title VII jurisprudence. Federal courts have consistently held that Congress intended the Act to be remedial and have construed it broadly.

> [The Act's] language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities.
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> * * *
>
> We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose

of Congress to eliminate the inconvenience, unfairness, and humiliation of . . . discrimination.

Rogers v. EEOC, 454 F.2d 234, 237-238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). See e.g., Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), and International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

In contrast to the broad language Congress chose to define unlawful employment practices, the section of Title VII addressing employer defenses is drafted in narrow detail and employs specific language to carefully enumerate the exceptions permitted by Congress. Indeed, this Court has recognized that "[d]efenses under Title VII and the Equal Pay Act are considerably narrower" than defenses chosen by Congress in other federal statutes. Manhart, 435 U.S. at 716, n. 32. Further, employer defenses that are not grounded in the

language and policy of Title VII have historically been rejected by the courts. [7]

B. Civil Rights Act of 1991

The intent and broad remedial policy of Title VII was reaffirmed and strengthened by the Civil Rights Act of 1991 ("CRA of '91). In the CRA of '91, Congress specifically restated its commitment to broad federal protection of an individual employee's civil rights by including Congressional findings that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in

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[7] E.g. Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971)(customer preference no defense to hiring only female flight attendants); Dothard v. Rawlinson, 433 U.S. 321 (1977)(the "BFOQ exception was meant to be an extremely narrow exception" to Act); Connecticut v. Teal, 457 U.S. 440, 447 (1982)(statutory language requires protection of individual; nondiscriminatory "bottom line" no defense). Meritor, 477 U.S. at 63-67 (no requirement plaintiff suffer economic loss in sexual harassment case); Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993)(held no requirement that plaintiff suffer injury or serious psychological effect in sexual harassment claim).

the workplace," and that "legislation is necessary to provide additional protection against unlawful discrimination in employment." CRA, '91, Sec. 2. If Congress wanted to limit the scope of Title VII it could have done so in the CRA of '91.

Instead, Congress broadened the available causes of action and remedies for plaintiffs seeking relief from discrimination, including those bringing suit under Title VII. Consistent with previous expressions of Congressional intent, the CRA of '91 reversed several decisions of the Supreme Court that had narrowed the scope of civil rights in the employment arena, including cases narrowing Title VII.[8] The

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[8] E.g., CRA of ' 91, EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991)(limited coverage of Title VII in foreign employment), reversed 42 U.S.C. 2000e(f), 2000e-1(b). Title VII was amended in 1978 in order to reverse two Supreme Court decisions that narrowed Title VII by holding that discrimination on the basis of pregnancy was not sex discrimination in violation of Title VII. General Electric v. Gilbert, 429 U.S. 125 (1976)(holding employers payment of disabilities except pregnancy doesn't violate the Act); Nashville Gas Company v. Satty, 434 U.S. 136 (1977)(sick leave denied to pregnant women but provided to

CRA of '91 also expanded remedies for victims of discrimination. E.g., 42 U.S.C. § 2000e (adding compensatory and punitive damages for intentional discrimination). Accordingly, in considering whether Congress would intend to cover same-sex harassment under Title VII, the Court should be guided by the policy statements of the CRA of '91 and the substantive amendments to Title VII that significantly expanded protection to individual plaintiffs.

C. EEOC guidelines and policy

The Equal Employment Opportunity Commission (EEOC) was created by Title VII[9] and is the federal agency chosen by Congress to enforce the Act and issue interpretive guidelines. The Meritor Court looked to the EEOC guidelines addressing sexual harassment and noted that "while not

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other non-occupational disabilities not violation of Act). Pregnancy Discrimination Act reversed these decisions. 42 U.S.C. § 2000e(k).

[9] 42 U.S.C. § 2000e-4.

controlling upon the courts by reason of their authority, [the guidelines] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 477 U.S. at 65. This reliance is consistent with the historical approach in considering Title VII issues. See e.g, Griggs v. Duke Power Co., 401 U.S. 424, 1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The EEOC guidelines in effect at the time McWilliams filed his Charge of Discrimination provided that "unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature constitute sexual harassment" when the conduct interferes with the individual's work performance or creates an intimidating, hostile, or offensive work environment. The EEOC stresses that it is the "totality of the circumstances" viewed on a case by case basis that must determine the legality of the conduct. 29 C.F.R. § 1604.11(a)(3)(b) (1986). Like the language of Title VII,

nothing in the EEOC guidelines suggest that discrimination claims should be limited to those in which the plaintiff and the person who is alleged to have committed the discrimination are of different sexes.

On the contrary, the EEOC guidelines are consistent with Supreme Court standards governing hostile work environment claims in that the guidelines focus on the conduct alleged and the effect it had on the complaining party and evaluate it according to the "totality of the circumstances" and facts of each case. See discussion of Meritor and Harris, infra. Moreover, the EEOC had issued a policy statement at the time McWilliams filed his suit, which provided that the "victim does not have to be of the opposite sex from the harasser" in order for sexual harassment to violate Title VII. EEOC Compliance Manual (CCH) Sec. 615-2 (b)(3).

Thus, the plain language of Title VII, the remedial policy of the Act, and the EEOC guidelines all militate strongly

against the standards created by the Fourth Circuit. This conflict is the foundation of McWilliams' petition.

II. Granting of the Petition is Warranted Because the Fourth Circuit's Opinion is Contrary to Supreme Court Precedent

The guidelines for evaluating hostile work environment cases were established by the Court in Meritor and Harris.

In Meritor the Court considered sexual harassment as a question of first impression and held that hostile environment sexual harassment is sex discrimination violative of Title VII. The employer in Meritor urged the Court to reject the Plaintiff's case based on its argument that Congress did not intend to cover the kind of case at issue there. The Court rejected that position. In concluding that hostile environment claims are actionable, given sufficient facts, the Meritor Court articulated the policy concerns underlying the theory:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the

> arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Meritor, 477 U.S. at 66, quoting, Henson v. City of Dundee, 682 F.2d 897, 902 (1982)(emphasis added). The Court explained that "[f]or [such] sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor, at 69, citing, Henson, 682 F.2d at 904. The Court also quoted with approval the EEOC's guidelines that direct an evaluation of the facts on a case-by-case basis and in light of "the record as a whole and the totality of the circumstances . . .." Id. Notably, the focus of the Meritor Court balanced a factual consideration of the

environment itself, and the effect of that environment on the individual employee. Nothing in that opinion suggests that a hostile environment analysis should consider the identity or relationship of the parties. The Court focused on the "sex-related conduct " and determined that whether it was "voluntary in the sense that the complainant was not forced to participate against her will is not a defense to a sexual harassment suit . . .." Id. at 68. Similarly, this Court should focus on the conduct at issue and determine whether the harassment was "sufficiently severe or pervasive" that it altered the "terms, conditions, and privileges" of McWilliams', employment by creating an environment hostile to him as a man.

In Harris, the Supreme Court considered a case in which the plaintiff was subjected to sex-based insults, innuendos, and "jokes" from the company president. In rejecting the employer's argument that Title VII should be read to require injury or serious psychological effects on a plaintiff, the Court looked

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first to the plain language of the statute and then harkened back to the Meritor opinion that words in the Act reflect a Congressional intent to provide broad protection to individual employees:

> As we made clear in Meritor . . . this language [of Title VII] 'is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent ' to strike at the entire spectrum of disparate treatment of men and women' in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment.'

Harris at 301, quoting, Meritor, 477 U.S. at 64, quoting, Manhart, 435 U.S. at 707 (emphasis added). The Court found that "an inquiry [into whether plaintiff's psychological well being was seriously harmed or injured] may needlessly focus the factfinder's attention on concrete psychological harm, an

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element Title VII does not require." Id. at 302 (emphasis added). Similarly, an inquiry into the sexual orientation of the parties is "an element Title VII does not require." The Harris Court further refined the Meritor test governing hostile environment claims as follows: "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. . .' Title VII is violated" Harris at 301, quoting Meritor at 67. Nothing in this definition suggests that the harassment must be perpetrated by a member of the opposite sex in order to be actionable. The Harris standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." Id. (emphasis added). The Supreme Court's test evaluates the specific factual allegations regarding an employee's environment because the statutory

violation turns on the environment being a "condition" of employment protected under Title VII. The Court has never focused attention on the sex or sexual orientation of the victim or the harasser, nor has it ever suggested that such an inquiry would be a relevant factor under its test.

Moreover, the Pandora's box which the Fourth Circuit has opened will result in defenses which could not have been intended. For example, in a more traditional case of sexual harassment a male harasser of a female employee could claim he is homosexual and not interested in women. Under the reasoning of the Fourth Circuit in McWilliams, regardless of how egregious the conduct or how hostile the environment, his actions would not violate Title VII. It does not stand to reason that Congress, or this Court, intended such a result.

III. Granting of the Petition is Warranted Because the Case Law is Replete with Conflicting Interpretations of the Law

Most federal courts that have carefully considered the issue of same sex harassment have found such harassment

covered by Title VII. In the cases that directly presented the issue, the courts have analyzed the plain language of the statute, the EEOC guidelines, and Supreme Court precedent to conclude that same sex harassment is actionable under Title VII. Williams v. District of Columbia, 1996 U.S. Dist. LEXIS 1338 (DDC Feb. 5, 1996); Ecklund v. Fuisz Technology, Ltd., 905 F. Supp.. 335 (E.D. Va. 1995); Sardinia v. Dellwood Foods, Inc., 1995 U.S. Dist. LEXIS 16073 (SDNY Nov. 1, 1995).[10]

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[10] Other cases include: King v. M.R. Brown, Inc., 911 F. Supp. 161 (E.D. Pa. 1995); Roe v. K-Mart Corp., 1995 U.S. Dist. LEXIS 18211 (D.S.C. Mar. 28, 1995); Raney v. District of Columbia, 892 F. Supp. 283, 286 (D.D.C. 1995); Nogueraas v. Univ. Of Puerto Rico, 890 F. Supp. 60, 63 (D.P. R. 1995); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133 (C.D. Ill. 1995); Prescott v. Independant Life & Accident Ins. Co., 878 F. Supp. 1545, 1550-1 (M.D. Ala. 1995); EEOC v. Walden Book Co., Inc., 885 F. Supp. 1100, 1104 (M.D. Tenn 1995); Pritchett v. Sizeler Real Estate Mgmt., 67 FEP Cases 1377, 1379 (E.D. La. 1995); Boyd v. Vonnahmen, 67 FEP Cases 1769, 1770-1 (S.D. Ill. 1995); McCoy v. Johnson Controls World Servs., 878 F. Supp. 229, 231-2 (S.D. Ga. 1995); Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307, 310 (N.D. Ill.

In Morgan v. Massachusetts General Hospital, 901 F.2d 186 (1st Cir. 1990), the court implicitly accepted that same-sex harassment would violate Title VII given adequate facts. The Second Circuit spoke more specifically in Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993), cert. denied, 114 S. Ct. 1189 (1994), noting that "harassment is harassment regardless of whether it is caused by a member of the same sex or opposite sex." In Baskerville v. Culligan International Co., 50 F.3d 428, 430 (7th Cir. 1995), Judge Posner noted that "sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases." See also EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515 (9th Cir. 1989)(Court noted that plaintiffs were female

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1994); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 542-44 (M.D. Ala. 1983), aff'd without opinion, 749 F.2d 732 (11th Cir. 1984).

and one harasser was female in sexual harassment case).[11]

Those cases which have concluded that same sex harassment does not present a cognizable claim under Title VII have done so generally without analysis and by relying upon Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994), and Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill.. 1988).[12] The issue of same-sex harassment was not on appeal

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[11] Some Courts have recognized that same sex harassment is actionable under Title VII in cases that were dismissed on other grounds. See Vandeventer v. Wabash Nat. Corp., 887 F. Supp 1178, 1180-1 (N.D. Ind. 1995); Ryczek v. Guest Servs., Inc. 877 F. Supp. 754, 761-62 (D.D.C. 1995); Polly v. Houston Lighting & Power Co., 825 F. Supp. 135, 137 (S.D. Tex. 1993); Marrero-Rivera v. Dept. Of Justice, 800 F. Supp. 1024, 1027 (D.P. R. 1992); Parrish v. Washington Nat'l Ins. Co., 1990 U.S. Dist. LEXIS 13934, *9 n.2 (N.D. Ill. Oct. 19, 1990).

[12] Wrightson v. Pizza Hut of Amer., Inc., 909 F. Supp. 367 (W.D. NC 1995); Quick v. Donaldson Co., Inc., 895 F. Supp. 1288 (S.D. Iowa 1995); Mayo v. Kiwest Corp., 898 F. Supp. 335 (E.D. Va. 1995); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995); Meyers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex 1995); Ashworth v. Roundup Co., 68 FEP Cases 869 (W.D. Wash.1995);

to the Garcia Court, however, and does not appear to have been briefed or argued by counsel. The Garcia Court devoted three sentences to the issue in what appears to be an after thought. Garcia's words provide no reasoning or analysis to support its apparent dicta that "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment had sexual overtones." Garcia at 451.[13]

The Goluszek court raised the issue sua sponte. Then, without evaluating Title VII, the legislative history or Supreme Court precedent, the court concluded that "the defendant's conduct was not the type of conduct Congress intended to

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Fleenor v. Hewitt Soap Co., 67 FEP Cases 1625 (S.D. Ohio 1995).

[13] The Fifth Circuit recently addressed the issue again in Oncale v. Sundowner, 1996 U.S. App. LEXIS 11479 (5th Cir. 1996). Writing for the panel, Judge Duhe concluded that Garcia was binding precedent that precluded the panel from reviewing the merits of the Title VII argument. Subsequent to McWilliams, the Fourth Circuit rejected the reasoning in Garcia. Hopkins v. Baltimore Gas & Electric Co., 77 F.3d 745 (4th Cir. 1996).

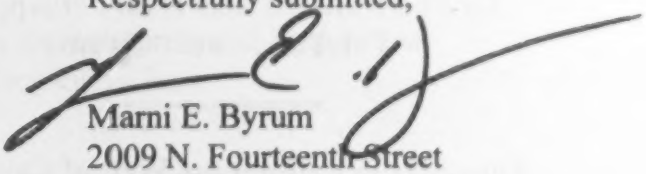
sanction when it enacted Title VII." 697 F. Supp. At 1456.

CONCLUSION

The importance of the issue presented, the recurring nature of the issue, and the far reaching impact of the issue on federal employment discrimination law, all warrant consideration of the case by this Court.

For the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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No._____

IN THE

Supreme Court of the United States

October Term 1995

MARK MCWILLIAMS,

Petitioner,

v.

FAIRFAX COUNTY BOARD OF SUPERVISORS,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

Appendix to Petition for Writ of Certiorari

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TABLE OF CONTENTS

APPENDIX TO PETITON FOR WRIT OF CERTIORARI

Opinion,
United States Court of Appeals
for the Fourth Circuit
Decided January 9, 1996 ..... A1

Order,
United States Court of Appeals
for the Fourth Circuit Denying
Petition for Rehearing and Suggestion
For Rehearing in Banc
Entered March 12, 1996 ..... A16

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

MARK MCWILLIAMS,
Plaintiff-Appellant,

v.

FAIRFAX COUNTY BOARD OF SUPERVISORS; WARD LEE CASH, JR.; MIGUEL BOSCHULTE,
Defendants-Appellees,

and

CARL HELLMANDOLLAR; TREVOR PINNOCK; DAVID PUCKETT; JAMES RIDDLE; CHARLES SHELTON; DOUGLAS WITSMAN; ELMER POWELL,
Defendants.

No. 94-1607

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-93-1284)

Argued: January 31, 1995

Decided: January 9, 1996

Before NIEMEYER and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Niemeyer joined. Judge Michael wrote a dissenting opinion.

BEST AV

COUNSEL

ARGUED: Marni Elaine Byrum, FITE, O'BRIEN & BYRUM, LTD., McLean, Virginia, for Appellant. Peter Donald Andreoli, Jr., Senior Assistant County Attorney, Fairfax, Virginia, for Appellees. **ON BRIEF:** Edna Ruth Vincent, FITE, O'BRIEN & BYRUM, LTD., McLean, Virginia, for Appellant. David P. Bobzien, County Attorney, Robert Lyndon Howell, Deputy County Attorney, Fairfax, Virginia, for Appellees.

OPINION

PHILLIPS, Senior Circuit Judge:

Mark McWilliams, an employee of Fairfax County, Virginia, appeals the dismissal by summary judgment of his claims under Title VII and 42 U.S.C. § 1983 against the Fairfax County Board of Supervisors (the County) and two of its supervisor-employees growing out of alleged acts of sexual harassment and physical abuse of McWilliams by fellow-employees. Reviewing the grant of summary judgment *de novo*, we affirm.

I.

The facts as construed most favorably to McWilliams from the summary judgment record are as follows.

Sometime in mid-1987, the Newington Facility of the Fairfax County Equipment Management Transportation Agency (EMTA) hired McWilliams as an automotive mechanic. At that time, McWilliams informed the facility of a learning disability that had arrested his cognitive and emotional development. Miguel Boschulte acted as McWilliams' supervisor from approximately September 1987 until November 1991. From November 1991 until September 1992, Ward Lee Cash replaced Boschulte as McWilliams' supervisor.

Beginning sometime in 1989, McWilliams' coworkers, collectively known as the "lube boys," beset McWilliams with a variety of

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offensive conduct. They teased him, asked him about his sexual activities, and exposed themselves to him. They taunted him with remarks such as, "The only woman you could get is one who is deaf, dumb, and blind." On one occasion, a coworker who sometimes took on supervisory responsibilities placed a condom in McWilliams' food.

The conduct involved physical assaults. On at least three occasions, coworkers tied McWilliams' hands together, blindfolded him, and forced him to his knees. On one of these occasions, a coworker placed his finger in McWilliams' mouth to simulate an oral sexual act. During another of these incidents, a coworker, Doug Witsman, and another placed a broomstick to McWilliams' anus while a third exposed his genitals to McWilliams. On yet another occasion, Witsman entered the bus on which McWilliams was working and fondled him.

The atmosphere of the all-male workplace at EMTA was heavily focused on sex. Copies of Playboy magazine and a variety of pornographic material were displayed in the bathrooms. Centerfold pictures as well as Snap-On-Tool calendars of scantily clad women were placed in and around mechanics' tool boxes. Off-color cartoons were circulated around the workplace. The radio was often tuned to talk shows that featured explicit sexual references.

On three occasions, McWilliams complained about certain of these matters to his supervisors. None involved incidents of physical abuse. In the spring or summer of 1991, he complained to Boschulte about the incident in which his coworker had placed a condom in his food. In response, Boschulte held a meeting with McWilliams' coworkers to discuss the incident. On July 22, 1992, McWilliams complained to Cash that Doug Witsman had offered him money for sex. Later in July, McWilliams told Cash that Witsman was "flicking his tongue at [him] and saying 'I love you, I love you.'" When questioned by Cash, Witsman admitted that he may have said something that McWilliams had taken the wrong way. Witsman then promised Cash that he would not "tease or harass Mr. McWilliams any more, any time."

McWilliams proffered evidence that others than he had informed EMTA supervisors about the lube boys' conduct and the general workplace environment. McWilliams deposed that Mike Stutzman, an

assistant supervisor, had informed Cash that the lube boys were taunting McWilliams and exposing themselves to him. Hannon Wallace Davis, a coworker, deposed that Stutzman, had told him of a conversation between Stutzman and Cash in which Stutzman had warned Cash that, although he did not know what was going on, the lube boys were engaging in horseplay and Cash ought to investigate the situation. McWilliams' name was not mentioned during the conversation. Davis further deposed that he thought McWilliams had complained to Billy Davis, a night foreman, about the lube boys and that Billy Davis had then informed Buck George, the day-shift superintendent.

In August 1992, Cash noticed that McWilliams appeared distraught. When he questioned McWilliams about his emotional state, McWilliams replied that he was upset about his parents' divorce, a failed relationship with a woman, and a potential reduction in force at EMTA. Cash then referred McWilliams to the County's Employee Assistance Program. Once there, McWilliams was diagnosed with severe emotional problems, which caused him to leave his employment in September 1992 on medical leave.[1]

On October 12, 1992, McWilliams informed EMTA management that he had been sexually abused by Witsman. The following day, the County initiated an investigation of McWilliams' allegations and the County Police Department began a criminal investigation of Witsman. In January 1993, McWilliams filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of sex and disability. The EEOC issued a right-to-sue letter on July 14, 1993, and on October 13, 1993, McWilliams commenced this action in federal district court. He alleged claims of workplace sex discrimination under Title VII against the County, related claims under 42 U.S.C. § 1983 against the County and his supervisors Cash and Boschulte for alleged constitutional violations, and other related claims under state tort law against his supervisors and several of his coworkers.[2] Following discovery, the defendants

[1]After his accumulated leave was exhausted, the County extended him additional leave through March 1993. From March 1993 until March 1994, McWilliams was carried by the County as an employee without pay. In March 1994, he was officially terminated.

[2]McWilliams also alleged claims under the Americans With Disability Act, which were later dismissed voluntarily.

moved for summary judgment on each of McWilliams' claims. Concluding that neither the County nor Cash or Boschulte had either actual or constructive knowledge of the coworkers' conduct on which the various claims were based, the district court granted those defendants' motion for summary judgment on the Title VII and § 1983 claims. The court then dismissed without prejudice the state claims against McWilliams' supervisors and coworkers.

This appeal by McWilliams challenging the grant of summary judgment in favor of the County, Cash, and Boschulte followed.[3] We review the dismissal by summary judgment *de novo*. *Overstreet v. Kentucky Central Life Ins. Co.*, 950 F.2d 931, 938 (4th Cir. 1991).

II.

McWilliams first contends that the district court erred in dismissing his Title VII claim of sexual harassment against the County.

Under Title VII of the Civil Rights Act of 1994, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Two forms of workplace sexual harassment have been held to constitute discrimination "because of" one's sex, hence to offend this statute: (1) *quid pro quo* harassment, in which an employer requires sexual favors of an employee in exchange for the benefits of employment, and (2) sexually-oriented harassment by one's fellow-employees sufficiently egregious to create a "hostile workplace environment" that is knowingly tolerated by the employer. McWilliams' claim is solely one of hostile-environment harassment.

An employee claiming hostile-environment sexual harassment by his employer must prove: (1) that the conduct in question was unwel-

[3]Though McWilliams purports to challenge the district court's dismissal of Title VII claims against Cash and Boschulte, no such claims were actually pleaded against those defendants, but only § 1983 claims. McWilliams does not challenge dismissal of his state-law claims which we are advised have been refiled in state court.

come, (2) that the harassment was based on his sex, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that some basis exists for imputing liability to the employer. *Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987).

The County raises serious questions as to whether McWilliams has proffered sufficient admissible evidence to support the necessary finding that any of his supervisors, hence the County, were on actual or constructive notice of coworker conduct sufficient to have created a hostile workplace environment. We need not address those problems, however, for we hold that McWilliams' hostile-environment claim fails for the more fundamental reason that such a claim does not lie where both the alleged harassers and the victim are heterosexuals of the same sex.[4] Here, both McWilliams and all his alleged harassers were indisputably males, and no claim is made that any was homosexual.[5]

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[4]It is important to emphasize that our holding of non-cognizability is not just limited to claims involving only heterosexual males but, further within that set, to claims of hostile-environment "harassment" claims. Our holding does not, therefore, purport to rule out claims of discrimination by adverse employment decisions (hiring, firing, etc.) involving only same-sex heterosexual actors (*e.g.*, male employee fired by male employer who prefers females for particular work). Nor, most significantly, does it purport to reach any form of same-sex discrimination claim where either victim or oppressor, or both, are homosexual or bisexual (hereafter "homosexual").

We therefore specifically reserve decision on the general question whether, when all the actors involved in a Title VII claim of sex-discrimination (in any of its forms) are of the same sex, the homosexuality of any may make the claim nevertheless cognizable as one of "discrimination because of [the victim's] sex." Because we do not reach it, it suffices here simply to note that the Supreme Court has not addressed the issue and that the lower federal courts which have are hopelessly divided. *See Quick v. Donaldson*, 895 F. Supp. 1288, 1294 (S.D. Iowa 1995) (recent survey of cases revealing the current state of the division).

[5]Though there is no allegation or proffered proof that either McWilliams or any of the "lube boys" was in fact homosexual, our dissent-

We believe this result compelled by a commonsense reading of the critical causation language of the statute: "because of the [claimant's] sex". As a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here (nor comparable female-on-female conduct) is considered to be "because of the [target's] '*sex.*'" Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's *sex.*

The difficulty of construing this causation language to reach such same-sex claims and the commonsense of not doing so are empha-

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ing brother apparently would either find that fact properly inferable from the nature of some of the harassing conduct, or consider it unnecessary to prove homosexuality-in-fact, homosexual innuendo being sufficient. And, on this basis he would reach the homosexuality issue and hold that same-sex "harassment" claims may lie under Title VII where homosexuality (either in-fact or as merely suggested by conduct) is involved. With respect, we believe that were Title VII to be so interpreted, the fact of homosexuality (to include bisexuality) should be considered an essential element of the claim, to be alleged and proved. The dissent expresses concern, because of proof (and privacy?) problems, about requiring such allegation and proof, but we believe it critical and eminently fair to require it if homosexuality is to be the critical fact making same-sex harassment claims cognizable under Title VII. The (ordinarily different) sexes of the relevant actors always has been an essential element of either form of Title VII sexual harassment claims. If such claims were to reach past different-sex to same-sex situations where homosexuality of one or the other or both of the actors is involved, that added fact would seem equally essential to the statement and proof of such a claim. If not required to be alleged, a defendant could be blindsided by proof of conduct merely suggestive of homosexuality between persons of the same sex who actually are heterosexuals. If not required to be proved, the sexual harassment claim would effectively have been extended to cover any conduct between even same-sex heterosexual workers that included sufficient homosexual innuendo. For these reasons, we do not believe that the homosexual issue properly can be considered to be presented in this case.

sized when the practical implications are considered. That this sort of conduct is utterly despicable by whomever experienced; that it may well rise to levels that adversely affect the victim's work performance; and that no employer knowingly should tolerate it are all undeniable propositions. But to interpret Title VII to reach that conduct when only heterosexual males are involved as harasser and victim would be to extend this vital statute's protections beyond intentional discrimination "because of" the offended worker's "sex" to unmanageably broad protection of the sensibilities of workers simply "in matters of sex." We cannot believe that Congress in adopting this critical causation language and the Supreme Court in interpreting it to reach discrimination by the creation of hostile workplace environments could have intended it to reach such situations. There perhaps "ought to be a law against" such puerile and repulsive workplace behavior even when it involves only heterosexual workers of the same sex, in order to protect the victims against its indignities and debilitations, but we conclude that Title VII is not that law.

McWilliams' Title VII claim was therefore properly dismissed by summary judgment.

III.

McWilliams also challenges the dismissal of his several claims under 42 U.S.C. § 1983 against the County and supervisors Cash and Boschulte in their individual capacities. These claims, all based essentially on the same conduct as that upon which his Title VII sex-harassment claim was based, confusedly alleged violations by the County and the two supervisor-defendants of several constitutional rights incident to McWilliams' harassment by his coworkers. Only two warrant discussion.[6]

[6]In addition to the § 1983 claims discussed in the text that follows, McWilliams also (apparently) claimed a violation of procedural due process rights; an equal protection violation in that his coworkers (as state-actors?) invidiously discriminated against him on the basis of his learning disability; and a claim that by failure to put a stop to his coworkers non-physical sexual harassment, the County (and his supervisors?) violated his substantive due process rights.

We have considered these and think none has any merit that warrants discussion.

A.

The principal claim under § 1983 was that by tolerating the workplace harassment suffered by McWilliams, these defendants violated his rights under the Equal Protection Clause not to be discriminated against on account of his gender. This claim of course is perfectly parallel to the hostile workplace claim brought under Title VII. While such parallel constitutional claims may lie in appropriate situations where, as here, the employer is a state-actor, *see Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994), that of McWilliams fails for the same reason we found his parallel Title VII claim not cognizable under that statute. We do not believe that the protection afforded by the Equal Protection Clause against invidious gender discrimination extends, any more than does the protection of Title VII, to acts of harassment by persons who are of the same gender and as those of the public employee-victim.

Without regard then to whether, as the district court thought, these defendants could not be charged with the requisite knowledge of harassing conduct, McWilliams' equal protection claim was rightly dismissed as one not involving invidious gender discrimination.

B.

The other § 1983 claim that warrants brief discussion is one seeking to hold the County and the two supervisor-defendants liable for a deprivation of McWilliams' substantive due process rights resulting from the instances of actual physical assaults that allegedly occurred during his coworkers' general course of harassment.

In order to hold his supervisors and his local government employer liable on such a claim, McWilliams must prove (1) that the injury alleged was caused by a violation of some settled constitutional right, and (2) that the individual supervisors and the local government employer were liable under some recognized theory of direct fault. *See Collins v. City of Harker Heights*, ___ U.S. ___, ___, 112 S. Ct. 1061, 1066 (1992).

We may assume that McWilliams' proffer of evidence sufficed to support a finding that he suffered constitutional injury as a result of

the physical assaults allegedly involved in the course of his general harassment by coworkers. The Due Process Clause of the Fourteenth Amendment affords, as one of its components, "substantive" protection against unreasonable bodily intrusions by state-actors. *See, e.g. Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (unreasonable paddling of public school student by school official could violate substantive due process right). The physical assaults alleged by McWilliams would, if proven, constitute the infliction of constitutional injury.

The problem, however, is with imposing liability for the infliction of the injury on persons—here supervisors and the municipal employer of the direct perpetrators—who did not engage in the specific conduct that inflicted injury. It cannot be done on any theory of vicarious liability; principles of *respondeat superior* do not apply in imposing liability under § 1983. *Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. 658, 692-94 (1978). Neither the supervisors in their individual capacities nor the County could be held liable except by proof of their direct culpability in causing the injury to be inflicted by subordinate employees. *Id.* at 694; *see Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994) (bases for supervisor liability); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (bases for municipal liability).

Liability might be imposed upon the supervisor-defendants, Cash and Boschulte, only by proof of their direct culpability in causing the injury either by directly authorizing it or by expressly or tacitly condoning by inaction a known pattern of comparable coworker conduct. *See Shaw*, 13 F.3d at 798-99. There is of course no evidence that either supervisor directly authorized the physical assaults or expressly condoned a known pattern of comparable conduct. To establish culpability by tacit condonation, the only remaining possibility, McWilliams must have proffered evidence that the supervisors knew or reasonably should have known of a comparable pattern of coworker conduct that was sufficiently widespread to pose a pervasive and unreasonable risk of constitutional injury to McWilliams, and that in the face of that knowledge they took no action to stop it but remained deliberately indifferent to it. *See Slakan v. Porter*, 737 F.2d 368, 372-73 (4th Cir. 1984). McWilliams' proffer of evidence here failed on the threshold requirement that Cash or Boschulte knew or had any reason to know of the specific incidents of physical assault (as

opposed to teasing and "horseplay") that alone could have involved violation of substantive due process rights. McWilliams repeatedly conceded he had never spoken to anyone, particularly to these two supervisors, about those specific incidents of physical assaults. J.A. 245, 254, 259, 260, 263.

The district court did not, therefore, err in dismissing McWilliams' substantive due process claim against Cash and Boschulte.

For essentially the same reasons, McWilliams' substantive due process claim against the County did not suffice to withstand summary judgment. The only available theory, roughly paralleling that of supervisor liability, upon which the County's liability might be based was that the County, through its "final decisionmakers," was itself directly culpable in the infliction of the constitutional injury by its agents. This might be established by proof either that a policy for which it was responsible was the effective cause of its employees' infliction of the injury, or that the County had effectively condoned the employees' conduct by inaction in the face of actual or constructive knowledge that it was occurring and that unless stopped it would almost surely result in the very constitutional injury alleged to have been suffered by McWilliams. *See Canton v. Harris*, 489 U.S. 378 (1989); *Spell*, 824 F.2d at 1385-88.

Here, McWilliams sought to invoke a "policy-as-effective-cause" theory of municipal liability by pointing to deficiencies amounting to "policy" in the County's training program for employees such as the "lube-boys." This is a viable theory, *see id.* at 1389, but the evidence proffered to support it was, however, wholly lacking on the critical requirement that a direct causal connection between specific deficiencies and specific injury be demonstrated. *Cf. id.* at 1390 (police training). The only possible evidence of any such causal connection was that this injury did occur and that whatever training had or had not been provided did not serve to prevent it. This simply cannot, for obvious reasons, suffice. *See Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Spell*, 824 F.2d at 1391.

McWilliams' attempt to invoke the "condoned-custom-as-effective-cause" theory of municipal liability was similarly lacking in even minimal evidentiary support. There simply was no proffered evi-

dence in the summary judgment record of any pattern, known or unknown to the County, of pervasive conduct by its employees of the type that allegedly befell McWilliams.

The district court did not err, therefore, in dismissing McWilliams' § 1983 claims against the County, Cash and Boschulte.

AFFIRMED

MICHAEL, Circuit Judge, dissenting:

It is too early to write this case off to meanness and horseplay. For now there is a material factual issue whether McWilliams was discriminated against because of his sex.[1] In addition, McWilliams has forecast sufficient facts to survive summary judgment on the issue of whether his employer had sufficient knowledge of the Title VII violations to be held accountable. I, therefore, respectfully dissent.

I.

I believe the majority makes a mistake to affirm summary judgment on the ground that there is no allegation that McWilliams and his male harassers are of different sexual orientations. That puts too fine a point on the "discriminat[ion] . . . *because of [his] . . . sex*" issue. I would simply hold that Title VII is implicated whenever a person physically abuses a co-worker for sexual satisfaction or propositions or pressures a co-worker out of sexual interest or desire. This can be established by an account of what the harasser did or said to the victim, and proof of the harasser's sexual orientation should not be required. The harassment must, of course, be sufficiently pervasive to create a hostile working environment.

[1]I would find same-sex harassment in the workplace to be actionable under Title VII. *See, e.g., Sardinia v. Dellwood Foods, Inc.*, 1995 U.S. Dist. LEXIS 16073, *8 ("dominant trend" is to allow such claims) (S.D.N.Y. Oct. 30, 1995), *interlocutory appeal certified*, 1995 U.S. Dist. LEXIS 17967 (S.D.N.Y. Nov. 29, 1995); *King v. M.R. Brown, Inc.*, 1995 U.S. Dist. LEXIS 14211, *14 (E.D. Pa. Sept. 22, 1995) ("the trend is to permit such claims to proceed").

I recognize that in a same-sex harassment claim, evidence of sexual orientation could be relevant to either side's case. However, it should not be elevated to a required element of the plaintiff's proof. *See Mogilefsky v. Superior Court*, 20 Cal. App. 4th 1409, 1416 (1993). That would burden the statute too much because the focus would shift from an examination of what happened to the plaintiff to a pursuit (surely to be complicated, far-ranging and elusive) of the "true" sexual orientation of the harasser.

Here, McWilliams alleges that his co-workers (i) "approach[ed] him in a sexual manner, touch[ed] him," Amend. Compl. ¶6, (ii) "asked him to perform sexual acts on them," *id.* ¶7, and (iii) "restrained him and touched him in a sexual manner," *id.* ¶8. The details are amply provided in the summary judgment record. On several occasions defendant Witsman told McWilliams that he wanted to have sex with him. At least once Witsman offered McWilliams money for sex. Witsman would do things such as flick his tongue at McWilliams, say "I love you, I love you," and ask for sex. Witsman would also follow McWilliams into the restroom where Witsman, with one hand in his unzipped fly, would put his arm around McWilliams or invite him into a stall. On several occasions Witsman asked McWilliams if he (Witsman) could masturbate McWilliams. Once when McWilliams was working under the dashboard of a bus, Witsman came up and rubbed McWilliams' penis until it became erect. At least three times defendants Pinnock, Riddle and Witsman tied McWilliams' hands together, blindfolded him and pushed him to his knees. During one of these incidents Witsman put his finger in McWilliams' mouth and simulated a sex act. In a separate incident, Riddle and Witsman held McWilliams down while Pinnock exposed himself and defendant Shelton put a broom handle between McWilliams' buttocks. These assaults and propositions were against the backdrop of constant, obsessive talk about sex — and not just male-female sex. One defendant even talked about having sex with little boys.

I would not require McWilliams to allege on top of these facts that his harassers were homosexual. The acts of assault and harassment are sufficiently direct and suggestive by themselves to raise the question whether they were done "because of [McWilliams'] . . . sex."

I appreciate the majority's concern that Title VII not be trivialized to encompass claims for horseplay of a sexual variety. Fortunately, courts are already dealing with this concern and are distinguishing between actionable hostility and non-actionable horseplay. *E.g.*, *Reed v. Shepard*, 939 F.2d 484, 491 (7th Cir. 1991) (plaintiff who relished sexual horseplay could not recover under Title VII); *Easton v. Crossland Mortgage Corp.*, 1995 U.S. Dist. LEXIS 15889, *37-40 (C.D. Cal. 1995) (same); *Niccoli v. Runyon*, 1995 U.S. Dist. LEXIS 14499, *10 & n.9 (E.D. Va. 1995); *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1296 (S.D. Iowa 1995) ("To say 'bagging' [sneaking up behind a man and grabbing a testicle] is merely horseplay is to trivialize its cruel and physical nature. Yet, to say 'bagging' is purely a sexually motivated activity exaggerates the sexual component involved [because the 'baggers' were neither] demanding sexual favors, [nor] were expressing sexual interest."); *Taylor v. Nat'l Group of Cos.*, 872 F. Supp. 462, 464 (N.D. Ohio 1994) (jury question presented as to whether conduct was merely horseplay engaged in "in a spirit of jocularity" or was "sexually hostile"); *D.R. v. Middle Bucks Area Voc. Tech. School*, 1991 U.S. Dist. LEXIS 1292, *19-20 (E.D. Pa. 1991) (school held not liable under 42 U.S.C. § 1983 when it had no knowledge of sexual assaults and harassment but knew only of "non-criminal horseplay" and "inappropriate and incorrigible classroom behavior"), *aff'd en banc*, 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993); *Smith v. Acme Spinning Co.*, 40 Fair Empl. Prac. Cas. (BNA) 1104, 1105 (W.D.N.C. 1986) ("on-the-job horseplay" in which plaintiff voluntarily participated and sometimes initiated not actionable as hostile environment sexual harassment); *Vermett v. Hough*, 627 F. Supp. 587, 599 (W.D. Mich. 1986) (plaintiff found office horseplay to be amusing, except when she was the target of the joke; Title VII claim denied).

McWilliams has forecast sufficient evidence of abuse and pressure to avoid summary judgment on the basis of horseplay. The facts, construed in McWilliams' favor, are sufficient to show that he was subject to a hostile work environment because of his sex. I would remand his Title VII claim for a trial.

II.

The district court also erred in granting the Board of Supervisors summary judgment on the Title VII claim on the ground that the Board lacked actual or constructive knowledge of the hostile workplace environment to which McWilliams was subjected.[2] McWilliams' Title VII claim against the Board is viable if knowledge about the abuse he suffered "was imputable on some factual basis to" it. *Spicer v. Commonwealth of Virginia*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc).

McWilliams produced sufficient evidence to create a genuine issue of material fact as to whether the EMTA supervisors had actual knowledge of a Title VII violation. McWilliams complained to supervisor Lee Cash at least three times that his co-workers were "teasing him about girls and other things."[3] Later, McWilliams expressly complained to Cash about the way Witsman would flick his tongue at him and say, "I love you, I love you." Mike Stutsman, an assistant supervisor at EMTA, told Cash that the teasing was sexual in nature and involved indecent exposure. Billy Davis, EMTA's night foreman, also told Cash and another supervisor, Miguel Boschulte, as well as Buck George, EMTA's day shift superintendent, that McWilliams was being harassed. Cash also learned *from Witsman himself* that Witsman had been teasing McWilliams. Another superintendent, Frank Knapp, held a meeting to discuss the way McWilliams was being mistreated. Two back-up supervisors, Dave Puckett and John Bowden, even participated in the condom incident described by the majority. *See ante* at 3. These facts about the supervisors' knowledge of the harassment provide an ample basis for imputing knowledge to the Board.

* * *

For all of these reasons, I would allow McWilliams to proceed with his Title VII claim.

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[2]Because it affirms on other grounds, the majority does not reach this issue.

[3]Because Cash knew that McWilliams was learning-disabled and found it difficult to communicate at an adult level, Cash should have inquired further at this point.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
March 12, 1996

No. 94-1607
CA-93-1284

MARK MCWILLIAMS

Plaintiff - Appellant

v.

FAIRFAX COUNTY BOARD OF SUPERVISORS; WARD LEE CASH, JR.; MIGUEL BOSCHULTE

Defendants - Appellees

and

CARL HELLMANDOLLAR; TREVOR PINNOCK; DAVID PUCKETT; JAMES RIDDLE; CHARLES SHELTON; DOUGLAS WITSMAN; ELMER POWELL

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

Supreme Court, U.S.
FILED
CLERK

No. 95-1983

In The

Supreme Court of the United States

October Term, 1995

MARK MCWILLIAMS,

Petitioner,

v.

FAIRFAX COUNTY BOARD
OF SUPERVISORS,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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33 pp

RESPONDENT'S COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly upheld the District Court's grant of summary judgment to the employer when the employee failed to present evidence that the employer knew or should have known of the alleged harassment.

2. Whether the Court of Appeals correctly upheld the District Court's grant of summary judgment to the employer when the employee failed to present evidence which showed that the claimed harassment was because of the employee's gender.

TABLE OF CONTENTS

Page

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

A. Procedural History 1

B. Statement of Facts 4

REASONS FOR DENYING PETITION 15

I. The Court Of Appeals Correctly Upheld The District Court's Grant Of Summary Judgment Because The Record On Summary Judgment Failed to Demonstrate That There Was A Triable Issue Of Fact On Whether The County Knew Or Should Have Known Of The Alleged Harassment 16

II. The Court of Appeals Correctly Affirmed The District Court's Grant Of Summary Judgment Because The Record On Summary Judgment Failed To Demonstrate That There Was A Triable Issue Of Fact On Whether The Alleged Harassment Was Because Of McWilliams' Gender 19

III McWilliams' Title VII Claim Is Moot 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wa. 195) 20

Baskerville v. Culligan Int'l, 50 F.3d 428 (7th Cir. 1995) 17, 19

Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995) 20

Boyd v. Vonnahmen, 1995 U.S. Dist. LEXIS 7542, 67 Fair Empl. Prac. Cas. (BNA) 1796, 66 Empl. Prac. Dec. (CCH) ¶ 43,620 (1995) 21

Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992) 17

Delaware State College v. Ricks, 449 U.S. 250 (1980) 26

EEOC v. Walden Book Co., Inc., 885 F. Supp. 1100 (M.D. Tenn. 1995) 21

Ecklund v. Fuisz Technology, Ltd., 905 F. Supp. 335 (E.D. Va. 1995) 20, 25

Fleenor v. Hewitt Soap Co., 81 F.3d 48 (6th Cir. 1996) 17

Garcia v. Elf Atochem d/b/a Ozark Mahoning & Co., 28 F.3d 446 (5th Cir. 1994) 19, 20, 23

Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988) 20, 21, 23, 24

Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993).. 18, 20

Hopkins v. Baltimore Gas and Electric Co., 77 F.3d 745 (4th Cir. 1996) 20, 21, 22

Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983) 21

TABLE OF AUTHORITIES – Continued

Page

Mayo v. Kiwest Corp., 898 F. Supp. 335 (E.D. Va. 1995) 20

McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996) 3, 4, 16, 21, 22

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 20

Myers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995) 20

Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186 (1st Cir. 1990) 19

Oncale v. Sundowner Offshore Services, Inc., 83 F.3d 118 (5th Cir. 1996) 20

Polly v. Houston Lighting & Power Co., 825 F. Supp. 135 (S.D. Tex. 1993) 23, 25

Prescott v. Ind. Life and Accident Ins. Co., 878 F. Supp. 1545 (M.D. Ala. 1995) 21

Quick v. Donaldson Co., Inc., 895 F. Supp. 1288 (S.D. Ia. 1995) 23

Raney v. District of Columbia, 892 F. Supp. 283 (D.D.C. 1995) 21

Ryczek v. Guest Services, Inc., 877 F. Supp. 754 (D.D.C. 1995) 19

Spicer v. Commonwealth of Virginia, 66 F.3d 705 (4th Cir. 1995) (*en banc*) 19

Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987) 19

Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307 (N.D. Ill. 1981) 21

Wrightson v. Pizza Hut of America, Inc., 909 F. Supp. 367 (W.D.N.C. 1995) 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Federal

42 U.S.C. § 1983 ..... 2, 3, 25

42 U.S.C. § 2000e-5(e) (Supp. 1993) 25

RULES OF COURT

United States Supreme Court

Rule 15.2 4

Federal

Section 703(a), Civil Rights Act of 1964 .....16, 27

Fed. R. Civ. P. 56(e) 10

ORDINANCES

Fairfax County Code § 3-1-1 12

Fairfax County Code § 3-1-11 12

Fairfax County Grievance Procedure (App. IV at 1377-1381 and 1392-1408) 12

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Fairfax County Board of Supervisors, by counsel, respectfully asks the Court to deny the petition for writ of *certiorari* of the petitioner, Mark McWilliams.

COUNTERSTATEMENT OF THE CASE

A. Procedural History.

The petitioner, Mark McWilliams, an employee of the Fairfax County Equipment Management and Transportation Agency ("EMTA"), filed suit on October 13, 1993, in the United States District Court for the Eastern District of Virginia ("District Court") against the Board of Supervisors of Fairfax County, Virginia ("County"); Lee Cash ("Cash"), McWilliams' first-line supervisor during 1991-92; and Miguel Boschulte ("Boschulte"), his first-line supervisor during 1987-91 at the EMTA facility at Newington ("Newington") where he worked; and a number of his coworkers, Carl Helmandollar, Trevor Pinnock, Elmer Powell, David Puckett, James Riddle, Charles Shelton, and Douglas Witsman ("coworker defendants").[1]

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[1] The coworker defendants were represented by separate counsel before the District Court. They have consistently denied McWilliams' allegations. *See, e.g.*, Appendix Volume IV at pages 1277, 1347, 1350-1351 and 1353, and Shelton Dep. Tr. at 30-31. (References to the Appendix are to the Appendix in McWilliams' appeal to the U.S. Court of Appeals for the Fourth Circuit. Hereinafter references to this Appendix will be to "App. (Volume Number) at (page number))." McWilliams did not

McWilliams' amended complaint alleged thirteen separate counts against the various defendants. Count VII alleged a Title VII claim against the County for sex discrimination.[2] The County denied liability and asserted

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appeal the dismissal without prejudice of his state claims against these defendants and subsequently dismissed his federal claims against them from his appeal to the Fourth Circuit.

Subsequently, McWilliams filed suit against the coworker defendants, with the exception of Powell, in the Fairfax County Circuit Court ("Circuit Court"), At Law No. 132548. Initially, McWilliams also named Cash and Boschulte as defendants in this suit, although McWilliams later nonsuited them (voluntarily dismissed them without prejudice) after the Circuit Court had granted their motion for a bill of particulars (more definite statement). In this suit, McWilliams alleged conspiracy against all of the coworker defendants; assault against Pinnock, Shelton, Riddle and Witsman; battery against Pinnock, Shelton, Riddle, and Witsman; false imprisonment against Pinnock, Shelton, Riddle and Witsman; and intentional infliction of emotional distress against all of the coworker defendants. On September 14, 1995, the jury returned verdicts in favor of the defendants on all of McWilliams' claims except assault and battery against Witsman alone and intentional infliction against all of the coworker defendants and fixed his damages at $24,000. The Circuit Court entered judgment on the verdict after denying McWilliams' and the coworker defendants' post-trial motions. The Virginia Supreme Court denied the coworker defendants' petition for appeal on April 15, 1996.

[2] Counts I, II, IV and V alleged claims pursuant to 42 U.S.C. § 1983 for violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment based upon claims of sex and disability discrimination against the County. Cash and Boschulte were sued pursuant to 42 U.S.C. § 1983 for violation of the Equal Protection Clause based upon a claim of sex discrimination in Count III and of disability discrimination in Count VI. The District Court granted summary judgment on

various affirmative defenses in its answer. After the parties had completed discovery and had filed their trial exhibits with the District Court in accordance with its amended scheduling order, the County filed its motion for summary judgment on April 1, 1994. After the parties had briefed the motion, the District Court heard oral argument on April 22, 1994, and granted summary judgment for the County.[3]

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these claims to the County, Cash and Boschulte, which the Fourth Circuit affirmed. In his petition, McWilliams does not ask this Court to review the Court of Appeals' affirmance of the District Court's grant of summary judgment to the County, Cash, and Boschulte on his various Section 1983 claims. McWilliams abandoned his claim against the Board under the Americans with Disabilities Act (Count VIII) in the District Court. Counts IX-XIII set forth various state law claims against Cash and Boschulte and the coworker defendants. For the subsequent disposition of these claims, see discussion *infra* at n.1.

[3] In granting summary judgment to the County, Cash and Boschulte on McWilliams' Section 1983 and Title VII claims, the District Court found that there was no actual or constructive notice to the County, Cash, or Boschulte of the harassment later claimed by McWilliams. April 22, 1994, Transcript at 36-38; *see also McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1194 (4th Cir. 1996). In its opinion, the Fourth Circuit noted "The County raises serious questions as to whether McWilliams has proffered sufficient admissible evidence to support the necessary finding that any of his supervisors, hence the County, were on actual or constructive notice of coworkers' conduct sufficient to have created a hostile workplace environment." 72 F.3d 1191 at 1195. The Fourth Circuit went on to decide the Title VII claim on the issue of harassment by coworkers of the same gender. However, in affirming summary judgment on the Section 1983 claims against the County, Cash and Boschulte, the Fourth Circuit found that "McWilliams'

McWilliams appealed the District Court's grant of summary judgment to the U.S. Court of Appeals for the Fourth Circuit. In a published opinion, a panel of the Fourth Circuit affirmed the District Court's grant of summary judgment. The Fourth Circuit denied McWilliams' petition for rehearing and suggestion for rehearing *en banc* on March 12, 1996. McWilliams' petition for a writ of *certiorari* followed.

B. Statement of Facts.

McWilliams' "Statement of the Case" in his petition omitted many of the material facts bearing on the issues in this case. For example, McWilliams failed to inform the Court that, by his own admission, he did not tell any supervisory personnel about the alleged acts of battery and sexual abuse by his coworkers until long after he had left the workplace. Because of this and other omissions, and being mindful of the Court's admonition in Rule 15.2 of the Rules of the United States Supreme Court, the County submits its own Statement of Fact.

McWilliams was hired as an Automotive Mechanic I in June 1987. Throughout his employment with EMTA, he worked at Newington. His first supervisor was Art

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proffer of evidence here failed on the threshold requirement that Cash or Boschulte knew or had any reason to know of the specific incidents of physical assault (as opposed to teasing and 'horseplay')" and "[t]here simply was no proffered evidence in the summary judgment record of any pattern, known or unknown to the County, of pervasive conduct by its employees of the type that allegedly befell McWilliams." 72 F.3rd 1191, 1197 and 1198. *See also* discussion *infra* at 6-12.

Lowry. Boschulte was his supervisor from approximately September 1987 through November 1991.[4] Cash was his supervisor from November 1991 through September 1992.[5]

McWilliams went out on sick leave in early September 1992. He was hospitalized from September 22 to October 9, 1992, and again from October 29 to November 20, 1992. Since September 21, 1992, he has never returned to work. After McWilliams had exhausted his accumulated earned leave, the County extended him extraordinary sick leave through March 1993.[6] From March 1993 until March 1994, he was carried by the County in a leave without pay status. Effective March 10, 1994, McWilliams was separated from County employment as a result of a reduction in force ("RIF") affecting EMTA due to the privatization of another EMTA facility.[7]

At all times during this period, the County was willing to return McWilliams to a paid status and offered several options to him for doing so.[8] McWilliams, however, citing medical advice, chose not to do so. As part of the RIF, McWilliams had the opportunity to take another County position or to take a position with the private

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[4] *See* App. IV at 1224-1225.

[5] App. IV at 1225 and 1232.

[6] App. IV at 1364-1365.

[7] *See* App. IV at 1411-1424. Several of the coworker defendants were also separated as a result of the RIF.

[8] App. IV at 1364-1365.

contractor. However, he elected to be separated and to take severance pay.[9]

Prior to making a complaint to EMTA management on October 12, 1992, McWilliams, by his own admission, never told anyone at EMTA or in County government about any of the acts he later alleged were committed by his coworkers, with two minor and isolated exceptions.[10] In the spring or summer of 1991, Boschulte noticed that McWilliams was acting sick and asked him what was wrong. McWilliams told Boschulte that someone had put a condom in his pastry. Boschulte was not present when McWilliams bit into the doughnut.[11] At that time, the Newington Superintendent, Sid Pullman, investigated the incident. Within a few days, a meeting was held with all employees in the section to make sure that there would not be a repetition of the incident.[12]

On July 22, 1992, McWilliams told Cash that Witsman had been teasing him about "girls and other things."[13] McWilliams was initially reluctant to say who had been teasing him and what the teasing was about. However,

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[9] App. IV at 1422-1423.

[10] App. I at 236 (79), 239 (91), 245 (114-115), 251 (133-134), 254-255 (146-148), 257 (156-158), 259-260 (167-168), 261 (173-174), 263 (181), 267 (196-198), 268-69 (201-206), 270 (210), 273 (220-222), 274 (224), 278-279 (240-244), 279-281 (247-255), 282 (258), 283 (261-262), 312-313 (376-380).

[11] Boschulte did not recall the incident. App. IV at 1226. However, he did not dispute that he knew about it at the time.

[12] App. I at 222-225 (24-34) and 295-296 (311-314).

[13] App. IV at 1233 and 1276.

Cash persisted and McWilliams told him.[14] Cash told McWilliams he would talk to Witsman.[15] Witsman told Cash he may have said something that McWilliams may have taken the wrong way and offered to apologize, stay away from him, or whatever Cash thought best.[16] Cash told him not to do it again.[17] Cash told McWilliams what he had done and told him to let him know if there were any further problems.[18]

Later, in August 1992, when Cash observed that McWilliams was in "bad shape" and asked him what was the matter, McWilliams told him he was upset because of his parents' divorce.[19] Cash referred McWilliams to the County's Employee Assistance Program because he was

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[14] *Id.*; App. I at 241-242 (96-100).

[15] App. I at 241-242 (98-100); App. IV at 1233-1234.

[16] App. IV at 1234-1236, 1256 and 1350.

[17] App. IV at 1235, 1256, 1276 and 1282-1284.

[18] App. I at 241 (97-99); App. IV at 1237 and 1348. McWilliams suggested in his brief in the Fourth Circuit that he had spoken to Cash on two other occasions about "harassment" by his coworkers. *See, e.g.*, McWilliams' Brief at 10-11, 15, and 19. According to his deposition, McWilliams spoke to Cash once in July and then again at the end of July. *But see* App. II at 519-520 (McWilliams' notes). Both Cash and McWilliams' depositions made it clear that Cash had to prod McWilliams to get any details and the name of who was allegedly harassing him, the matter complained about was Witsman's teasing of McWilliams, and that the only time McWilliams complained to Cash was in July of 1992. App. I at 241-242 (99-100); *see also* App. IV at 1275-76, 1278 and 1299.

[19] App. I at 308 (362); App. IV at 1282, 1284 and 1348.

concerned about him.[20] Cash had a meeting with the other workers and told them not to tease McWilliams.[21] According to McWilliams, the teasing stopped immediately.[22]

According to McWilliams, neither Cash nor Boschulte was ever present during any of the incidents of harassment complained about by McWilliams. According to McWilliams, neither Cash nor Boschulte had any knowledge concerning any of the alleged "harassment" except for what McWilliams told them.[23] McWilliams admitted that he never told either Cash or Boschulte about any of the incidents he later complained about except for the pastry incident and Witsman's teasing of him.[24] According to McWilliams, the other employees always acted "innocent" whenever the supervisors were present.[25] McWilliams admits that he has no firsthand knowledge about what Cash or Boschulte knew about the incidents other than the two instances where he made a complaint.[26]

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[20] App. I at 233-234 (65-69) and 283-284 (263-264); *see also* App. IV at 1283 and 1348.

[21] App. IV at 1283, 1278, 1296 and 1299.

[22] App. IV at 1278, 1296 and 1299.

[23] App. I at 372-375; App. IV at 1228-1230 and 1238.

[24] App. I at 236 (79), 239 (91), 245 (114-115), 251 (133-134), 254-255 (146-148), 257 (156-158), 259-260 (167-168), 261 (173-174), 263 (181), 267 (196-198), 268-69 (201-206), 270 (210), 273 (220-222), 274 (224), 278-279 (240-244), 279-281 (247-255), 282 (258), 283 (261-262), 312-313 (376-380) and 372-375; App. IV at 1227-1230, 1238 and 1349.

[25] App. I at 262 (177).

[26] App. IV at 1449. In his brief to the Fourth Circuit, McWilliams represented that he had told *Billie* Davis, a night

According to McWilliams, while he worked at EMTA, he socialized with his coworkers in their off-hours,

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foreman, that his coworkers were harassing him. He also asserted that Billie Davis was told by the Superintendent, Buck George, to "mind his own business" when Billie Davis told him about it. McWilliams' Brief at 9; *see also* McWilliams' Brief at 22 and 23. The Court should not be misled into believing that the deposition testimony cited in support of those representations is either that of McWilliams or *Billie* Davis. The cited testimony, App. III at 1163-1164, is that of *Hannon* Davis, another of McWilliams' coworkers. However, this "evidence" did not meet the requirements of Fed. R. Civ. P. 56(e) because Hannon Davis, by his own testimony, had no personal knowledge of either conversation. App. III at 1164-1165. Further, Hannon Davis' testimony made it clear that the Billie Davis-Buck George conversation took place (if at all) after Cash had sent McWilliams for treatment through the Employee Assistance Program in August 1992. App. III at 1163-1164; *see also* App. IV at 1288. Hence, George's comment, "mind your own business, none of your concern, we will handle it." Hannon Davis admitted that he never told any foreman that anyone was "messing with Mark." App. III at 1166.

McWilliams also referred to a meeting held by Frank Knapp to suggest that Knapp had some knowledge of McWilliams' complaints concerning his coworkers *prior* to his leaving the work place. McWilliams' Brief at 9; *see also* McWilliams' Brief at 22. Knapp was George's replacement as Superintendent of Newington. George retired in 1993. *See* App. IV at 1346. Knapp's comments, as reported by Hannon Davis, did not refer to any complaints arising *before* McWilliams left the work place but were directed at rumors and accusations which had arisen *during and after* the subsequent Equity Programs, Police, and EEOC investigations which commenced after McWilliams had left the work place in the fall of 1992 and ended in early 1993. App. III at 1154-1155

In his brief to the Fourth Circuit, McWilliams described a lurid work environment at EMTA. *See* McWilliams' Brief at 9-10. However, nowhere did he cite to any evidentiary material,

attending parties, watching football games in each

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including his own deposition, to suggest that he was in any way offended by the alleged choices of radio programs, magazines, jokes, or cartoons or that he had complained about any of these matters until long after he had left the workplace. In fact, McWilliams admitted that he had kept a collection of the allegedly offensive cartoons at home. Despite the fact that he had this collection, he did not disclose it to the Equity Program, Police, or EEOC investigators nor did he bring it up with the psychologists and psychiatrists with whom he had been treating. App. I at 268-274 (201-224); 276-283 (232-263); 287-288 (279-280).

McWilliams also claimed that Mike Stutzman, another supervisor, had warned Cash about the so-called "lube boys" and their harassment of McWilliams. McWilliams' Brief at 14-15 and 21-22. The evidentiary materials cited by McWilliams in support of this "fact" do not meet the Rule 56(e) standard. Under Fed. R. Civ. P. 56(e), supporting affidavits must be based upon personal knowledge, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated therein.

McWilliams' own deposition testimony did not demonstrate that Stutzman had any firsthand knowledge of the matters which he allegedly reported to Cash. App. I at 263-264 (182-184). Further, McWilliams' deposition concerning this alleged conversation made it clear that he was simply reporting what he said Hannon Davis had told him that Stutzman had told him (Davis). However, according to Davis in his deposition, the alleged conversation did not concern McWilliams directly and was directed toward problems generally in the "old section." App. III at 1138-1140. Davis stated that Stutzman had told him that he (Stutzman) had not seen anything. App. III at 1139. Both McWilliams' and Davis' testimony is hearsay not subject to any exception. F.R.E. 802. Neither McWilliams nor Davis has any personal knowledge that the alleged conversation even happened. F.R.E. 602. In any event, even the hearsay did not disclose that Cash was told about anything that would give any kind of notice of the harassment alleged by McWilliams.

other's homes, and going on fishing trips.[27] McWilliams also admitted that he had engaged in "horseplay" in the workplace with his coworkers.[28]

During the summer of 1992, McWilliams' coworkers noted that he appeared to be upset. When asked by others what was the matter, McWilliams said that he was very upset about his parents' divorce, that he was upset that his relationship with Kathy Hall had not worked out, and that he was worried about being transferred or separated as a result of projected privatization of and reductions in force at EMTA.[29] In August 1992, when Cash asked him what was bothering him, McWilliams told him he was upset because of his parents' divorce.[30]

At all times relevant to this lawsuit, the County clearly prohibited discrimination against employees, such as McWilliams, on the basis of *inter alia*, sex and/or

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[27] App. I at 255-256 (148-155), 294-295 (307-310), 299 (326-327), 307-308 (359-362); App. IV at 1227, 1244, 1253, 1257, 1350-1352, 1354 and 1357.

[28] App. I at 257 (157-159), 275 (228), 317 (396-398); App. IV at 1285.

[29] App. I at 234 (68-69), 308-309 (362-364, 366-367); App. IV at 1241, 1250-1251, 1283-1284, 1287, 1297, 1348, 1352, 1356 and 1357. In April or May 1992, McWilliams' parents began divorce proceedings. App. I at 233-234 (67-68) and 302 (339). In the summer of 1992, he dated a school bus driver, Kathy Hall, on several occasions. App. I at 303-307 (343-359).

[30] App. I at 308 (362); App. IV 1283-1284, 1287 and 1348. In his deposition, McWilliams did not deny that when he was asked about what was bothering him he told people that he was concerned about these matters. However, he contended that in fact he was upset because of the alleged harassment.

disability, and provided for various mechanisms for identifying, investigating and resolving employee complaints of discrimination.[31] The County's Office of Equity Programs ("Equity Programs") is and was specifically charged with investigating employee claims of discrimination.[32] In addition, employees may pursue grievances concerning such allegations to a final and binding decision under the County's state-mandated grievance procedure.[33]

There was no evidence of any history of complaints of discrimination on the basis of sex, male, or disability on the part of the County.[34]

McWilliams first advised EMTA management that he was making a claim of sexual harassment on October 12, 1992.[35] On October 13, 1992, the Newington Superintendent, Earl George, at the direction of Miriam Hudgins, the EMTA Personnel Officer, investigated McWilliams' complaint, which was initially directed at Witsman and Pinnock, and took statements from them on October 13, 1992, and later took a statement from Cash on October 22,

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[31] Pers. Reg. § 1.8 (App. IV at 1382); App. IV at 1369-1370; *see also* Fairfax County Code §§ 3-1-1 and 3-1-11 and the Fairfax County Grievance Procedure (App. IV at 1377-1381 and 1392-1408).

[32] App. IV at 1369-1370; *see also* App. IV at 1409-1410.

[33] App. IV at 1392-1408.

[34] *See* App. IV at 1371.

[35] *See* App. IV at 1281.

1992.[36] McWilliams subsequently submitted a workers' compensation claim on October 19, 1992.[37]

On October 23, 1992, McWilliams, at the suggestion of the Employee Relations Division of the County's Office of Personnel, came to Equity Programs to file a complaint. He was interviewed on November 6, 1992.[38] Equity Programs conducted interviews of 18 employees as part of its investigation during November and December 1992, and January 1993. Equity Programs completed its final investigative report on February 3, 1993.[39] This investigation uncovered no eyewitnesses to the acts of physical touching claimed by McWilliams.

During the course of that investigation, rumors of a possible criminal act surfaced. A second investigation was conducted in January and February of 1993 by Investigator Robert Murphy of the County Police Department. During the course of that investigation, McWilliams made and then retracted allegations of unwelcome physical touchings by several coworkers. The investigation uncovered no criminal acts.[40] Following these two investigations, disciplinary action was taken against several employees.[41]

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[36] App. II at 518; and App. IV at 1255, 1274 and 1276; *see also* App. IV at 1281 and 1366-1368.

[37] App. IV at 1275.

[38] App. IV at 1259-1273 and 1277-1279.

[39] *See generally* App. II at 472-482 and App. IV at 1366-1370.

[40] *See generally* App. 1430-1445; *see also* App. IV at 1291-1299 and 1368.

[41] Both before the District Court and the Fourth Circuit, McWilliams argued that the County did not have a policy

McWilliams filed his charge of discrimination with the U.S. E.E.O.C. on January 7, 1993.[42]

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prohibiting the type of conduct he complained about because at the time, the County did not have a policy prohibiting "sexual harassment." The record on summary judgment demonstrated that this was a somewhat disingenuous semantical argument. As was addressed in detail in the County's response to McWilliams' Interrogatory Number 5 (McWilliams' Tr. Ex. 135): "Conduct which constitutes harassment of a sexual nature or on the basis of disability violates the County's Standards of Conduct, subjecting the violators to disciplinary action ranging from written reprimands to dismissal." App. IV at 1369-1370. In its answer, the County specifically referred to Chapter 16 of the County Personnel Regulations which was also provided in response to McWilliams' request for production of documents. App. IV at 1383-1391.

The Standards of Conduct in Chapter 16 specifically required employees to "exercise courtesy and tact in dealing with fellow employees." App. IV at 1389. Further, they specifically prohibited "engaging in criminal, dishonest, immoral or disgraceful conduct prejudicial to the County" and "threatening or assaulting a fellow employee." App. IV at 1389, 1390. Any conduct which can be characterized as "sexual harassment" is proscribed by the Standards of Conduct. *See, e.g.*, App. IV at 1239; *see also* App. IV at 1427.

In fact, McWilliams' own trial exhibits demonstrated that conduct amounting to sexual harassment was punishable under the Standards of Conduct at the times relevant to his complaint. *See, e.g.*, App. II at 479 and App. IV at 1301-1314. The fact that after the investigations of McWilliams' allegations the County adopted a policy specifically dealing with sexual harassment cannot as a matter of law "foster a finding that the County had an insufficient and ineffective sexual harassment policy prior to McWilliams' complaints" as urged by McWilliams. McWilliams' Brief at 25. F.R.E. 407.

[42] App. IV at 1447.

REASONS FOR DENYING PETITION

The Court should deny the petition because the judgment of the Fourth Circuit, affirming the District Court's grant of summary judgment to the County on McWilliams' Title VII claim, is plainly correct. Even if this Court were to decide that the two questions presented by McWilliams in his petition should be answered in the negative, the County would still be entitled to summary judgment because of McWilliams' failure of proof on two of the elements of his Title VII claim. None of the cases cited by McWilliams in his petition stand for the proposition that an employer is liable for hostile environment sexual harassment by coworkers, absent a showing that the employer knew of, or should have known of the harassment, and had failed to take prompt and reasonably effective remedial action once it had knowledge. None of the cases cited by McWilliams in his petition support the proposition that a Title VII plaintiff does not have the burden of proving that the alleged discrimination was because of his or her sex.

The real issue presented by the facts of this case is not whether a person who alleges that he or she has been physically and mentally assaulted by harassment of a sexual nature by his or her coworkers should have a cause of action against the alleged perpetrators for damages.[43] Nor is the issue really as simple as the global

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[43] Such offensive conduct creates a number of causes of actions for a variety of common law torts. In this case, McWilliams has asserted such actions, proven some of them and failed to prove others and has received damages in accordance with his proof.

question whether Section 703 of Title VII of the Civil Rights Act of 1964 ("Title VII") permits an action for sex discrimination based upon same-sex sexual harassment.[44] The real issue presented by this case is whether a plaintiff may defeat his or her employer's motion for summary judgment on his or her claim of sex discrimination under Title VII based upon harassment with sexual connotations by his or her coworkers when the record on summary judgment discloses that there is no evidence from which a reasonable jury could find that the employer knew or should have known of the harassment, yet failed to take prompt and reasonable remedial action or that the alleged discrimination was because of the plaintiff's sex.

I. The Court of Appeals Correctly Upheld The District Court's Grant Of Summary Judgment Because The Record On Summary Judgment Failed To Demonstrate That There Was A Triable Issue Of Fact On Whether The County Knew Or Should Have Known Of The Alleged Harassment

Even if the harassment alleged by McWilliams had constituted discrimination against him on the basis of his sex, male, the record on summary judgment showed that McWilliams could not satisfy a critical element of a Title VII claim: i.e., that the County knew or should have known of the harassment and had failed to take prompt

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[44] The Fourth Circuit specifically reserved ruling on the general question whether, when all of the actors involved in a Title VII claim of sex discrimination (in any of its forms) are of the same sex, the homosexuality of any may make the claim nevertheless cognizable as one of "discrimination because of [the victim's] sex." *McWilliams*, 72 F.3d 1191 at 1195 n.4.

and remedial action. *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48 (6th Cir. 1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 193 (5th Cir. 1991), *cert. denied*, 502 U.S.1072 (1992).

There is no question that when McWilliams made his complaint on October 12, 1993, of serious misconduct on the part of his coworkers, the County took prompt and effective remedial action by immediately and thoroughly investigating the factual basis of his complaint, by taking disciplinary action in those instances where it was warranted, and by providing McWilliams extensive sick leave and the opportunity to return to active employment with the County. McWilliams' claim is that in some unspecified manner, the County should have known what McWilliams claimed was going on before he made his complaint on October 12, 1992, and taken some action despite the fact that he had not told any supervisor about the alleged harassment. McWilliams' claim must fail because based upon McWilliams' own deposition testimony, there was no way that the County could have known about the alleged misconduct before he made his complaint on October 12, 1992.

According to McWilliams, his coworkers *only* harassed him when supervisory personnel were not around. In other words, the only persons who knew about the alleged misconduct at the time when it occurred were the alleged victim, McWilliams, and the alleged perpetrators. Under these circumstances, only the alleged victim would have had any incentive to make the alleged misconduct known to supervisory personnel. However, according to McWilliams, with two minor

exceptions,[45] he did not tell any supervisory personnel about any of the acts he later claimed were harassment until after he had left the workplace in September 1992.

Not only did McWilliams not tell any supervisory personnel about what he now claims was in fact happening to him, when he was asked by such personnel and other coworkers what was bothering him, according to McWilliams, he "lied" and attributed his upset to other concerns, such as his parents' divorce, the failure of a romantic relationship, and his concerns about being laid off. McWilliams' "lie" was credible because in fact his parents were getting divorced, he had a failed romantic relationship, and his foreboding about a reduction in force was shared by everyone else. Based upon McWilliams' own account, the only way the County could have discovered the acts which McWilliams later complained about earlier than his complaint of October 12, 1992, was for McWilliams to have told someone. With the exception of two minor complaints discussed above, McWilliams did not do so until long after the fact and after he had left the workplace. When McWilliams did make a complaint, the County and its supervisory

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[45] The two minor exceptions were the pastry incident in 1991 and Witsman's teasing of McWilliams in July 1992. In both cases, supervisory personnel took what appeared to be, based on what McWilliams was willing to say at the time, prompt and effective remedial action. These two isolated and separated instances by themselves cannot by themselves amount to the severe and pervasive harassment sufficient to alter the conditions of McWilliams' employment, as required by this Court in *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).

employees took appropriate action considering the available information. The fact that the County took prompt and reasonably effective remedial action upon learning of McWilliams' complaints, protects it from liability under Title VII. *Spicer v. Commonwealth of Virginia*, 66 F.3d 705, 709-711 (4th Cir. 1995) (*en banc*); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995); *Garcia v. Elf Atochem d/b/a Ozark Mahoning & Co.*, 28 F.3d 446, 451 (5th Cir. 1994); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 193 n.4 (1st Cir. 1990); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987); *Ryczek v. Guest Serv. Inc.*, 877 F. Supp. 754 (D.D.C. 1995).

II. The Court Of Appeals Correctly Affirmed The District Court's Grant Of Summary Judgment Because The Record On Summary Judgment Failed To Demonstrate That There Was A Triable Issue Of Fact On Whether The Alleged Harassment Was Because of McWilliams' Gender

Title VII prohibits discrimination on the basis of the plaintiff's sex. In this context, "sex" does not refer to the act of sex or sexual orientation or preference, but to the employee's gender, i.e., the employee is either a man or a woman. Title VII by its own words and in its interpretation by the courts does not purport to protect employees from any and all possible unpleasantness in the workplace. Title VII protects individuals from discrimination based upon the individual's membership in a protected class, such as his or her race, creed, national origin, or sex. As noted by this Court, "Without question, when a supervisor sexually harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the

basis of sex. . . . Sexual harassment which creates a hostile or offensive environment for *members of one sex* is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 67 (1986) (emphasis added); *see also Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (discriminatory conduct because of their gender). The record on summary judgment was void of any evidence that McWilliams was the victim of the alleged harassment of his coworkers because he was a male.

The case law cited and discussed by McWilliams on the issue of same-gender sexual harassment ranges the gamut of those cases holding that such a claim can never be actionable under Title VII, *see, e.g., Garcia v. Elf Atochem d/b/a Ozark Mahoning & Co.*, 28 F.3d 446, 451 (5th Cir. 1994) and *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988),[46] to those cases which, at least under certain circumstances, would allow such a claim, *see, e.g., Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995). The Fourth Circuit in this case and *Hopkins v. Baltimore Gas and Electric Co.*, 77 F.3d 745 (4th Cir. 1996), has not, like the Fifth Circuit in *Garcia*, categorically foreclosed a same gender sexual harassment action under

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[46] Some of the cases following *Garcia* and/or *Goluszek* and holding that same sex sexual harassment is never actionable are: *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996); *Wrightson v. Pizza Hut of America, Inc.*, 909 F. Supp. 367 (W.D. N.C. 1995); *Mayo v. Kiwest Corp.*, 898 F. Supp. 335 (E. D. Va. 1995); *Ashworth v. Roundup Co.*, 897 F. Supp. 489 (W. D. Wa. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521 (D. S.C. 1995); and *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995).

Title VII; however, it does require proof that the harassment is because of the employee's gender. *McWilliams*, 72 F.3d 1191, 1195-1196; *Hopkins*, 77 F.3d 745, 748-753.

In reviewing the authorities cited by McWilliams, it is significant that many of the cases which held that a plaintiff made out a same-gender sexual harassment claim under Title VII were cases of *quid pro quo* sexual harassment by a supervisor. *See, e.g., Raney v. District of Columbia*, 892 F. Supp. 283 (D.D.C. 1995); *Boyd v. Vonnahmen*, 1995 U.S. Dist. LEXIS 7542, 67 Fair Empl. Prac. Cas. (BNA) 1769, 66 Empl. Prac. Dec. (CCH) ¶ 43,620 (1995) (homosexual supervisor); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995) (homosexual supervisor); *Prescott v. Ind. Life and Accident Ins.Co.*, 878 F. Supp. 1545 (M.D. Ala. 1995) (homosexual supervisor); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983); and *Wright v. Methodist Youth Service, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981) (homosexual supervisor). This type of case is clearly distinguishable on the facts from this case which involves a claim of hostile environment based upon harassment with sexual connotations by co-workers of the same gender.[47] The courts in these cases found that the harassment was because of the employee's sex where a homosexual supervisor made homosexual advances to the plaintiff because they were of the same

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[47] In fact, a number of these cases distinguished *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) on the ground that *Goluszek* involved a claim for hostile environment, rather than, *quid pro quo*, sexual harassment. *See, e.g., Boyd v. Vonnahmen*, 1995 U.S. Dist. LEXIS 7542, 67 Fair Empl. Prac. Cas. (BNA) 1769, 66 Empl. Prac. Dec. (CCH) ¶ 43,620 (1995); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995).

gender, in the same manner that a heterosexual supervisor's sexual advances toward an employee were because the employee was of the opposite sex. Whatever merit this argument has in the context of a *quid pro quo* sexual harassment claim, it has no merit in analyzing hostile environment claims, where, as here, all of the actors involved are of the same gender. If a harasser has the choice of harassing either males or females and exclusively harasses only one gender, it may be inferred that the victim's gender is the basis of the harassment. However, in a case such as this, where the harassers, the victim and all of the other coworkers are of the same gender, there is no basis for inferring that the basis for the harassment was the victim's gender.

As the Fourth Circuit found in this case,

> As a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct here (nor comparable female-on-female conduct) is considered to be "because of the [target's] '*sex*.' " Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually focussed speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's *sex*.

McWilliams, 72 F.3d 1191, 1195-1196 (emphasis added); *see also Hopkins*, 77 F.3d 745, 751-753.

A review of the record on summary judgment considered in light of the totality of the circumstances demonstrates that McWilliams failed to proffer any admissible evidence sufficient to create a triable issue of fact that the harassment he complained of was because he was a male. This failure is fatal to his Title VII claim. *Quick v. Donaldson Co.*, 895 F. Supp. 1288 (S.D. Ia. 1995) (sexual harassment of any kind to be actionable under Title VII must be based on gender discrimination); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 136-138 (S.D. Tex. 1993) (even assuming *arguendo* same-sex sexual harassment is actionable under Title VII, harassment must be because of victim's gender); *Garcia v. Elf Atochem d/b/a Ozark Mahoning & Co.*, 28 F.3d 446 (5th Cir. 1994); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). According to the plaintiff in *Goluszek*, his male coworkers periodically asked him if he had gotten any "p --y" or had oral sex, showed him pictures of nude women, told him they would get him "f ---ed," accused him of being gay or bisexual, and made other sex-related comments. 697 F. Supp. at 1454. The coworkers also poked him in the buttocks with a stick. *Id.* However, as the court succinctly pointed out:

> Title VII does not make all forms of harassment actionable, nor does it make all forms of verbal harassment with sexual overtones actionable. . . .
>
> During the times relevant to his claim, Goluszek was a male in a male-dominated environment. . . . The argument that Goluszek worked in an environment that treated males as inferior consequently is not supported by the record. In fact, Goluszek may have been harassed "because" he is a male, but that harassment was

> not of a kind that created an anti-male environment in the workplace. A wooden application of the verbal formulations created by the courts would salvage Goluszek's sexual-harassment claim. The court, however, chooses to adopt a reading of Title VII consistent with the underlying concerns of Congress. . . .

Goluszek, 697 F. Supp. at 1456 (citation omitted); *see also Quick v. Donaldson Co., Inc.*, 895 F. Supp. 1288 (absent a basis in gender discrimination no actionable sexual harassment).

In ruling that Goluszek was not the victim of sexual harassment within the meaning of Title VII, the court noted that he was a male in a male-dominated environment and that, therefore, the argument that he worked in an environment that treated males as inferior was not supported by the record. The same rationale applies to the facts of this case. As in *Goluszek*, McWilliams worked in a male-dominated environment. All of the persons whom he alleges "harassed" him were male. The harassment that McWilliams alleges he suffered did not create an anti-male environment in the workplace. *Goluszek*, 697 F. Supp. at 1456. Title VII does not afford protection to individuals who are generally less powerful than other individuals. "Actionable sexual-harassment fosters a sense of degradation in the victims by attacking their *sexuality*." *Goluszek*, 697 F. Supp. at 1456 (emphasis added). Moreover, to recover under Title VII, McWilliams must prove that "but for [his] sex, [he] would not have been the object of harassment." *Goluszek*, 697 F. Supp. at 1456. McWilliams cannot point to any evidence in the record to support the contention that but for his sex, male, he would not have been treated by his coworkers in

the way he claims he was.[48] *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 138 (S.D. Tex. 1993).

McWilliams' Title VII claim fails because he failed to demonstrate that there was a triable issue of fact that the alleged harassment was because of his male sex.[49]

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[48] The facts in *Goluszek* are very similar to the facts in this case. Even those courts permitting a same-gender sexual harassment case to proceed have distinguished *Goluszek* factually. *See, e.g., Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995) (Goluszek was being harassed about sexually related matters; he was not actually being harassed because he was male).

[49] Neither the District Court nor the Fourth Circuit reached the issue of whether McWilliams had filed a timely Title VII action, although the County raised that defense. McWilliams' Title VII claim is time barred because he did not file a timely charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"). Under Title VII, a plaintiff must file his or her charge of discrimination with the U.S. EEOC within 180 days of the act or acts giving rise to complaint. 42 U.S.C. § 2000e-5(e) (Supp. 1993). McWilliams filed his charge of discrimination on January 7, 1993. Therefore, his Title VII claim could not be based upon any alleged act occurring on or before July 12, 1992. Based upon the record on summary judgment, there can be no argument that the County knew or should have known of any alleged harassment and failed to take appropriate action with respect to any act or complaint of McWilliams after that date. Indeed, the only alleged act of harassment which occurred after that date shown by the record was Witsman teasing McWilliams in July 1992. As discussed *supra*, that complaint was promptly dealt with by Cash.

McWilliams attempted to avoid the statutory bar by claiming that he was entitled to the "continuing violation" exception to the statutes of limitations applicable to his Section 1983 and Title VII claims. *See* App. II at 404-412. This claim is without merit.

III. McWilliams' Title VII Claim Is Moot

In his Title VII claim, McWilliams seeks to hold the County liable in damages for the injuries inflicted upon him in his employment by his coworkers. McWilliams has already litigated his claims against his coworkers in the state courts. McWilliams prevailed on a few of his claims and lost on others. He has already received a final judgment for money damages for the injuries which he proved were caused by his coworkers. The County's liability for damages under Title VII, if any, is derivative of the damages for which the coworkers are liable. McWilliams has already received a judgment for such damages. Therefore, his Title VII claim against the County is moot because he already has a judgment for such damages.

The facts known or which could have been known by the Board were that, until after McWilliams had left the workplace in September 1992, and after he had made his complaint to the Office of Equity Programs in October 1992, the only incidents involving McWilliams and his coworkers were minor and isolated and did not constitute violations of Title VII. As has been noted previously, under McWilliams' own version of events, the only practical way that County supervisory personnel could have found out about the alleged harassment of McWilliams by his coworkers would have been for McWilliams to have told them about it. The evidentiary record in this case can only support a finding that two isolated and unrelated events were communicated to these defendants. *See Delaware State College v. Ricks*, 449 U.S. 250, 256-257 (1980) (limitations periods on Section 1981 and Title VII claims, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protects employers from defending claims arising from employment decisions long past). Through no fault of the County, McWilliams did not promptly assert his rights.

CONCLUSION

This case is not the appropriate case for this Court to determine whether and under what circumstances Section 703(a) of Title VII of the Civil Rights Act of 1964 permits an action for harassment with sexual connotations by coworkers of the same gender. The final result in this case would be the same whether this Court would decide that harassment by coworkers of the same sex which has sexual connotations is always, never, or sometimes actionable under Title VII.

The County was entitled to summary judgment on McWilliams' Title VII claim because McWilliams had failed to raise a triable issue of fact whether the alleged harassment by his coworkers was because of his sex, male, or that the County knew, or should have known, of the harassment and had failed to take prompt and effective remedial action. For the reasons stated above, the Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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